

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, DC**

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<b>COMPUTER RESERVATIONS SYSTEM</b>	)	Docket OST-97-2881
<b>(CRS) REGULATIONS; STATEMENTS OF</b>	)	Docket OST-97-3014
<b>GENERAL POLICY</b>	)	Docket OST-98-4775
	)	Docket OST-99-5888
<b>Notice of Proposed Rulemaking</b>	)	
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**COMMENTS OF THE LARGE AGENCY COALITION**

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### **A. WHO ARE LAC'S MEMBERS?**

The Large Agency Coalition ("LAC") consists of 22 large, corporate-oriented travel agencies across the nation. Most of the 22 are represented in 2002 Travel Weekly Top 50 U.S. Travel Agencies (June 23, 2002), and all but one of the rest are listed in Business Travel News' 2002 Business Travel Survey (May 27, 2002), which covers 84 top, corporate-oriented agencies.

Here is the complete list of LAC's members, excluding one large agency that has chosen to remain anonymous:

	<b>Name</b>	<b>HQ Area</b>
1.	Adelman Travel Group	Milwaukee
2.	Aladdin Travel & Meeting Planners	Winston-Salem
3.	Altour International	New York
4.	Azumano Travel Service	Portland, OR
5.	Balboa Travel	San Diego
6.	CI Travel	Norfolk
7.	Executive Travel	Kansas City
8.	Morris Murdock Travel	Salt Lake City
9.	National Travel Services	Charleston, WV
10.	Northwestern Travel Management	Minneapolis

11.	Omega World Travel	Washington
12.	Passageways Travel	Traverse City, MI
13.	Professional Travel	Cleveland
14.	Protravel International	New York
15.	Tower Travel Management	Chicago
16.	Travel and Transport	Omaha
17.	Travel Destinations Management Group	Baltimore
18.	Travel Management Partners	Raleigh-Durham
19.	Travel Store	Los Angeles
20.	Tzell Travel Group	New York
21.	Wright Travel	Nashville

The total of members using each CRS (we will use DOT's term here, although the term "GDS" has supplanted "CRS" in the trade) as its primary system is as follows:

<u>System</u>	<u>Number</u>
Sabre	9
Galileo	5
Worldspan	7
Amadeus	<u>1</u>
	22

Many of the members have secondary and even tertiary CRSs, which they typically acquired for one of three reasons: (1) the dominant airline in a city other than their own headquarters city insisted that the agency use the CRS affiliated with the airline, (2) a newly won corporate client travel department desired to keep a particular system at an on-site location rather than change to the primary system of the travel agency; or (3) an acquired travel agency had continuing contractual obligations to another vendor. Despite DOT's concern about agencies' inability to use multiple systems because of high quotas, LACs members have not had trouble meeting their quotas on multiple systems.

Finally, the majority of members use their own PCs rather than CRTs. Virtually all have five-year contracts rather than three-year contracts.

While LAC's members are large agencies, the updated contract offers described in these comments apply to agencies of all sizes, as do the arguments presented.

## **B. SUMMARY OF POSITION**

In these comments, LAC shows that productivity pricing – however defined – is not a deterrent to agencies’ use of the Internet, secondary CRSs, or other supplier links, for six reasons:

1. The quotas presently being offered are either non-existent or small enough to leave agencies with a very large margin for booking on the Internet, secondary systems, or other supplier links.
2. Using multiple CRSs does not help agencies find better fares.
3. In corporate travel, E-fares are useful in only a small percentage of transactions, and it is by no means clear that agencies can lawfully book on carrier websites.
4. There is no lower-cost method of distribution than the CRS.
5. Travel agencies are not sharing the spoils of “supra-competitive profits” at the expense of the airlines.
6. Above all, agencies must offer the fares and rates that are in their clients’ best interests, regardless of whether those fares and rates will maximize agency revenue.

LAC next shows that productivity pricing is not responsible for:

1. Penalty pricing based on lost booking fees, which LAC opposes in any event.
2. Fraudulent bookings, as alleged by several carriers.
3. High booking fees, as also alleged by several carriers.

LAC further shows that airlines' use of affiliated CRSs to leverage their monopoly hub positions is much less prevalent than it used to be. More importantly, LAC predicts that, with the sale of Worldspan, such tying may disappear. Therefore, LAC submits that antitrust concerns should not justify outlawing productivity pricing.

LAC notes that abolition of productivity pricing would hurt the most efficient distributors, high-volume travel agencies, and LAC asks the Department not to disrupt a competitive, efficient system.

LAC supports the remaining proposals related to affecting travel agencies, as they would make the travel distribution system even more competitive.

In the alternative, LAC would support repeal or nonrenewal of all of the rules.



Finally, LAC proposes a universal-participation rule, under which all public fares must be published in all channels of distribution, as the exclusion of some channels, such as the telephone and the CRS, from access to the lowest fares is the most unfair and deceptive practice of all.

### **C. LET'S UPDATE THE RECORD**

DOT's understanding of how productivity pricing works comes largely from the parties' direct comments in late 1997 and reply comments in early 1998, when parties such as LAC described to DOT how CRS contracts worked. While DOT has done a commendable job of trying to keep the record current, there are gaps in DOT's understanding of how current CRS offers work, which airlines market CRSs, and the extent to which agencies can access E-Fares through the CRS.

#### **1. Typical Contract Offers in 2003**

The following descriptions of the quotas, penalties, incentives, and other key provisions are composites of offers made in early 2003 to agencies of all sizes. No individual LAC member's contract can be identified from the following descriptions.

##### **a. Sabre Offers**

All Sabre offers are now "unbundled". Sabre offers larger agencies a contract called "Optimal Earnings Plan" ("OEP"), and it offers smaller agencies a contract called "Simplicity Plan". We describe each plan here.

The OEP pricing works like this:

Step 1: The agency earns a credit for every CRS booking – not just the bookings in excess of a quota.

Step 2: The agency is debited for each piece of hardware, software, or data line that it leases from Sabre. For example, the lease cost for one terminal address (a connection to the system from an agency-owned PC rather than a leased CRT) is \$1.95 per month, and the lease cost for one kind of Sabre CRT is \$39 per month.

This menu pricing means that every agency is given a choice between leasing CRTs from the vendor or not leasing them. Contrary to DOT's assertion that the vendors make purchasing third-party PCs relatively unattractive (67 FR 69421), which was true in 1997 and 1998, Sabre's pricing for CRTs is now so high that very few if any Sabre agencies still lease CRTs under contract offers made in the last year or two. For example, if an agency leases the CRT at \$39 per month, it will pay \$2,340 over 60 months, whereas the agency can buy a perfectly good PC from a store for 50% to 75% less.

Step 3: At the end of each three, six, or 12-month period (as the agency wishes), Sabre pays the agency, by check, the difference between the credits and debits.

Step 4: In the event that the agency's total annual (not monthly or quarterly) bookings are less than a fixed annual threshold or quota, which is

typically only about 70% of the agency's last 12 months' total actual Sabre bookings, the agency must pay Sabre a penalty of \$2.40 for each booking below that fixed number. That amount is itself about one-third less than the penalty that Sabre imposed prior to 2003.

The four foregoing steps combine to produce a net quota which is substantially lower than the 70% figure cited above. For example, let us take an agency that currently has 300,000 annual Sabre bookings, and whose contract provides for an annual quota of 70% thereof, or 240,000. If the agency, in a future year, does only 200,000 bookings, it will owe 40,000 times \$2.40 in penalties, or \$96,000, at the end of the year, but it would have meanwhile earned the net incentive in Step 3 above on all 200,000 of its bookings. The latter always outweighs the penalty under recent offers. In fact, as a rule of thumb, the agency will not fall into the net penalty category until its bookings drop by 50% below its present level of productivity, and 35% below the annual quota. In effect, the OEP system provides a 50% cushion of bookings which can be made outside the CRS before the agency would owe any money to Sabre.

For smaller agencies, Sabre likewise offers an unbundled plan called the "Simplicity Plan." Under this plan, pricing works as follows:

Step 1: Sabre pays the agency an amount equal to approximately \$1,000 per PC, so that the agency can then purchase its own PCs, associated wiring, and broadband connection to Sabre.

Step 2: Sabre pays the agency an incentive per booking for all bookings (not just bookings above a quota) as long as the agency does approximately 1000 – 2000 bookings per year agency-wide (not per PC and not per month). The incentive is paid annually. If the agency does not meet the annual quota, it does not earn the booking incentive, but it does not owe any money to Sabre. In other words, the agency pays no penalty to Sabre, no matter how many bookings it makes outside of the Sabre system, or how few in Sabre. Thus, unlike the Optimal Earnings Plan, the agency can make 100% of its bookings on the Internet, or on a secondary system, or otherwise, without having to pay Sabre a penny.

In general, Optional Earnings Plan contracts have five-year terms, and Simplicity Plan contracts have three-year terms. However, unlike the case in 1997 (67 FR 69422), today's three-year Sabre contracts are as attractive as its five-year contracts, proportionately speaking.

#### b. Galileo Offers

This year's Galileo offers are almost the same as Sabre's Optimal Earnings Plan offers. In fact, Galileo appears to have pioneered the unbundled-pricing concept, and Sabre appears to have copied it several years ago. Remarkably, both now charge \$2.40 for shortfalls below an annual threshold.

The only discernable differences between the two vendors' offers are as follows:

- Galileo offers an extra incentive for year-over-year growth bookings.
- Galileo offers a choice of annual thresholds or quotas, with a higher threshold at approximately 66% of the agency's current productivity, and a lower quota at about 33% thereof. With the former, incentives are higher.
- Galileo charges for more kinds of services than Sabre does.
- Galileo pays incentives monthly, as opposed to quarterly, semi-annually, or annually in Sabre's case.

Using the same calculations as we used in Sabre's Optimal Earnings Plan, we would see that an agency's Galileo bookings can drop well over 50% before the agency must pay Galileo a penalty.

Finally, Galileo offers both five-year and three-year terms. The latter are not proportionately as attractive as Sabre's three-year offers. However, they are still attractive enough so that most Galileo agencies appear to be selecting the three-year option.

### c. Worldspan

Of the four vendors, Worldspan is the only one that still typically makes traditional, bundled offers with monthly quotas per CRT. It is also the only vendor

left that almost always makes its five-year offer proportionately much better than its three-year offers, as well as the only vendor that makes it as attractive to lease CRTs as not to lease them.

Further, Worldspan has recently lowered its typical quotas significantly, as have Sabre and Galileo, as noted above. Here is how the pricing, incentives, and penalties of a typical Worldspan offer work:

Step 1: Worldspan pays the agency an incentive, monthly, for all bookings (not just those over the quota).

Step 2: Worldspan has a quota which is now typically about 180 bookings per CRT per month. Typically, this quota is approximately 30% below the agency's actual productivity for the past 12 months. If the agency meets the quota, then the hardware, software, and dataline charges are waived for the month. Otherwise, the agency must pay a penalty roughly equal to that percentage of the total monthly hardware, software, and dataline charges that the agency's actual bookings per CRT below the quota bear to the quota. For example, if the agency's quota is 180 and its actual productivity is 144 bookings per CRT for the month, then its shortfall is 36, which is 20% below the quota. Thus, it must pay a penalty of about 20% of the monthly charges. Therefore, unlike Sabre and Galileo, Worldspan does not charge a penalty for "lost bookings."

Significantly, the percentage is imposed even while the agency earns the incentive for all segments. Therefore, the true quota below which the agency would owe money to Worldspan is quite low.

Therefore, again, as in the case of Sabre and Galileo, agencies can afford to move about half of their CRS bookings to the Internet or elsewhere without owing the vendor any money at all, under offers being made today.

d. Amadeus

Amadeus' offers are, in 2003, the most free of risk. All offers are "unbundled", in that they work as follows:

Step 1: Amadeus pays the agency an incentive per segment or booking.

Step 2: Amadeus deducts its fixed monthly charges for hardware and software and it remits the net incentive on a monthly basis.

Significantly, Amadeus offers have no quotas or thresholds per se in 2003. Thus, the only way in which the agency can end up owing money to Amadeus is if the agency makes so few bookings that the incentives do not exceed the monthly charges. Typically, an agency would have to do less than 50 segments or bookings per booking device per month in order to owe Amadeus any money. Since the typical Amadeus agency probably does well in excess of 100 bookings per device per month, the cushion available for shifting bookings to the Internet is greater than 50%.



Amadeus offers three or five-year contracts; the former are proportionately as good as the latter, as Amadeus, unlike Worldspan, makes no effort to steer agencies to five-year commitments.

## **2. Tying May Be Dying**

In 1997, LAC complained that major airlines tied overrides, waivers and favors, and corporate discounts to use of the affiliated CRS. 67 FR 69395. LAC further noted that, in hub cities, an agency needed to use the affiliated CRS in order to survive. LAC asked DOT to strengthen its anti-tying rules and step up enforcement. 67 FR 69405.

Much has happened in six years. Continental sold its ownership interest in Amadeus. USAir sold its Galileo shares. American spun off Sabre. Cendant bought United's share of Galileo. In early March 2003, Delta, Northwest, and American appeared quite pleased to announce that they will be shedding Worldspan by mid-2003.

Thus, by the time that DOT adopts its final rules in this proceeding, only Amadeus will have airline ownership. Its principal owners, Lufthansa, Air France, and Iberia, do not tie airfares, marketing benefits, or overrides to use of Amadeus.

After Worldspan's divestiture, it is unlikely that Delta or Northwest will require travel agencies to use Worldspan as a condition of obtaining special airfares or overrides, as they have done in the past. No airline has ever done so after divestiture, although American does try to hike corporate discount fares a bit

if the travel agency does not use Sabre. Furthermore, despite DOT's statements about marketing ties, 67 FR 69383, LAC's members have not found that United still markets Galileo or that American still markets Sabre.

Even if marketing is still taking place, DOT should draw a clear distinction between tying and marketing. Tying is the airline practice of insisting that an agency use a system as a condition of obtaining airline benefits. It is clearly illegal under the antitrust laws when the airline has local monopoly power. On the other hand, marketing is benign; it is the practice of using airline benefits as additional incentives for an agency to accept a CRS offer.

In short, by mid-year, the then-owning airlines will not be tying, and the now-tying airlines may no longer be owning. In the absence of tying, antitrust concerns should not be relevant to this proceeding.

### **3. The Vendors Are Providing E-Fare Functionality**

As of early 2003, the E-Fares of the top six U.S. airlines, American, Continental, Delta, Northwest, United, and USAirways, are available through all four CRSs – either as an enhancement viewable in a separate window under an arrangement between the CRS and a “screen scraper” company, or as an integrated part of the CRS' functionalities.

Three of the four vendors have agreements with Fare Chase, a company that provides a CRS enhancement that consists of a display of the lowest fares from over 50 airlines and public websites, including Southwest, but as of last week,

excluding American. While agencies do not get productivity-pricing credit for Fare Chase bookings, the vendors are encouraging agencies to sign up for these enhancements, as they are an additional profit center for the vendors.

For example, Worldspan has just launched Total Rates, which integrates Fare Chase's fares directly into the main displays and allows the travel agent to book an E-Fare from that display. Importantly, Worldspan places the booking in a regular Worldspan reservation record (PNR) for reporting and billing purposes.

At least two of the four vendors are going further and incentivizing major U.S. airlines to place their E-Fares into the CRS in return for a discount on all booking fees. Galileo's Momentum program includes all the E-Fares of United and USAirways for any Galileo travel agency subscriber that wants to participate. Sabre's Direct Connect Availability (DCA) program incorporates USAirways E-Fares for all Sabre agencies. All four vendors are working hard to develop or enhance these kinds of programs, and several more major carriers may well soon participate in Momentum, DCA, and the Worldspan and Amadeus equivalents that are probably currently in development.

In summary, the updated record herein should show that:

- Typical CRS contract offers now contain lower quotas that provide agencies with a 50% margin to move their bookings to other CRS or the Internet.

- Tying by airlines of airline benefits to use of affiliated or marketed CRSs is dying and will be dead by late 2003
- E-Fares are available through the CRS to some extent now and will be much more available in the near future.

**D. THE SIX MYTHS BEHIND DOT’S PROPOSAL TO  
OUTLAW PRODUCTIVITY PRICING**

**1. The Myth Of High Quotas**

DOT states that:

“The systems’ productivity-pricing structures seem to deter travel agents from using the Internet. When travel agents book E-fares through the Internet, for example, they run the risk of failing to satisfy the minimum monthly booking quota set by the productivity pricing provisions.” 67 FR 69379.

“The booking quota is high enough so that the agency as a practical matter cannot afford to make substantial use of another system or database for its bookings.” 67 FR 69391

As shown, in Section C.1. above, these statements are no longer descriptive of current CRS offers. Typical quotas in offers being made now by Sabre, Galileo, and Worldspan are approximately 30% below agencies’ current productivity. Sabre and Galileo offers have no “monthly booking quota.” Finally, as noted, Amadeus has no quotas at all.

Furthermore, as also noted, all systems now offer their incentives for all bookings – not just those above the quota. This means that, when an agency’s bookings fall below the annual Sabre and Galileo quota or the monthly Worldspan

quota, the vendors still pay incentives on the bookings made. The result is that the agency will not actually owe any money to the vendor until their productivity drops about 50% below current levels.

As reported by PhoCus Wright, E-fares make up less than 2% of sales. 67 FR 69380. Therefore, the number of bookings that LAC's members could move to the Internet is at 25 times greater than the supply of E-fares! Accordingly, it is mathematically impossible for Internet bookings to cause the agency to fail to achieve its CRS quota, under offers being made today.

## **2. The Myth Of Multiple Systems' Benefits**

DOT states that:

“While the services offered by each system are comparable, using multiple system could improve a travel agency's ability to serve its customers. Travel agents could then acquire more accurate and complete information on available airline flights, and the agencies' ability to use multiple systems would encourage the system to compete more on the quality and range of their services. 57 FR 43797.” 67 FR 69370.

In support of these assertions, DOT cites its own explanatory statement from 1992. Thus, DOT's information is over a decade old.

The truth is that there is so little difference among the systems that any benefits are far outweighed by the burdens of integrating two systems into one back office, cross training personnel, and the inability of one system to find bookings made in another system. However, even assuming that these burdens did not exist or could be overcome at low cost, there is so little difference among the systems that LAC's members would be hard-pressed to identify a single one of them, except, of course, that Southwest Airlines is available only in Sabre.

As noted on page 2 of these comments, many of LAC's members have secondary or tertiary systems. However, the reasons for acquiring the systems were not to "acquire more accurate and complete information on available airline flights." It is no longer true, if it ever was, that an agent can find more flights in two systems than he or she can in one, or more in three than in two. The systems are nearly universal. As DOT said, "Almost every U.S. airline, including most of the low-fare airlines, participates in each of the systems." 67 FR 69370. As far as "flights" themselves are concerned, the schedules are all fed to the systems simultaneously by one service. So, even assuming that productivity pricing prevents or inhibits bookings outside of the primary CRS, which, as shown above, it does not, there is no airfare or flight-related reason to procure other CRSs.

Ironically, the real differences among the systems are in the non-air suppliers, such as cruiselines, tour operators, and vacation rentals, but DOT has no jurisdiction over such matters.

### **3. The Myth Of E-Fares' Importance In Corporate Travel**

The NPRM reflects DOT's ambivalence about whether E-Fares are important. On the one hand, the Department says:

“E-Fares, however, make up a relatively small share of all airline bookings. PhoCus Wright reports that such fares constitute less than 2 percent of an airline's total ticket sales.” 67 FR 69380.

On the other hand, E-Fares must be important because:

“ASTA contends that productivity pricing keeps travel agents from using the Internet to book fares lower than those sold through a system.” 67 FR 69391.

On the third hand, DOT notes:

“[T]ravel agents are increasingly using the Internet for airline bookings.” 67 FR 69399.

If PhoCus Wright's percentage is correct, then ASTA could not possibly be right, as a 2% shift away from the CRSs will not cause any travel agency to incur penalties under the offers discussed above. Further, if ASTA is not correct, then DOT's basic thesis about productivity pricing (that it inhibits agencies from making reservations outside the primary CRS) must be incorrect, too.



The truth is that PhoCus Wright and ASTA are both wrong, at least when it comes to business travel.

E-Fares were not designed for business travelers, who are LAC's members' principal clients. To the extent that a business traveler obtains an E-Fare that is better than what could be found in the CRS, the offering airline has probably made a mistake in making it available for business-travel-type itineraries, such as last minute, mid-week roundtrips for a night or two. When agencies pluck E-Fares off the Internet for business travelers, the airline has cannibalized its own passenger base, which is a mistake.

Studies have shown that E-Fares are hugely overrated for business travel. For example, Topaz International, Ltd., the airfare audit firm in Portland, Oregon, published the results of three surveys in the last 12 months. They can be found at [www.etopaz.com/news.html](http://www.etopaz.com/news.html). The most recent only, completed in January 2003, concludes that non-Internet tickets through corporate travel agencies were \$135 less than the same itineraries booked on Internet travel sites, which represented at 23% savings for the corporation.

Finally, and potentially most importantly, it is by no means clear that all airlines allow travel agencies to book E-Fares. A few, such as Delta, have expressly authorized the practice. One, American, expressly forbids it. On its website, at [www.aa.com/everyfare.html](http://www.aa.com/everyfare.html), at the page called "Travel Agency Questions and Answers," here is the Q and A:

*“Why does a travel agent need to join EveryFare? To get Web fares, can’t travel agents just book through AA.com?”*

“The EveryFare program offers travel agencies the ability to have access to American’s Web fares. According to the terms and conditions posted on AA.com, third parties are not allowed to book through the site. The EveryFare Program will provide agents with the ability to book Web fares through their GDS. We hope to eventually allow participants to lawfully book on AA.com; however, this right is currently not part of the program or the EveryFare participation agreement and will be governed by a separate agreement.

*“Will you ever allow an agency to book on AA.com?”*

“Later this year, we anticipate that agencies in the EveryFare Program may have the option of booking directly on AA.com and avoiding the GDS fee entirely. [Note: This has never occurred.] The agency pays a lower fee than the current GDS fee but still receives the same allowance. The ability will be covered by a separate agreement between participating agencies and American.

*“How do you know if agencies are booking on AA.com, and what do you do about it?”*

“We monitor site activities and if we see third party agencies illegally booking on AA.com, we contact them and request that they stop – through legal action if necessary.”

American even forbids third parties, such as screen scrapers, from accessing and using its E-Fare information, as shown by the retraining order it obtained last week against Fare Chase.

Most of the other airlines have remained silent. It would be most ironic if DOT took action designed to encourage agencies to book E-Fares only to be told later by major airlines that agencies were not allowed to do so.

#### **4. The Myth Of The Low-Cost Link**

Throughout the Notice of Proposed Rulemaking, there is an implication that, but for the CRSs’ practices, the airlines could and would develop low-cost links. The two pieces of evidence cited by DOT are the allegedly unsuccessful effort of Alaska Airlines to get travel agencies to make reservations on its website, 67 FR 69391, and Orbitz’ direct link to American Airlines bypassing Worldspan. Let us discuss each.

Alaska Airlines, which has complained about high CRS booking fees for over a generation, made its comment more than five years ago. Today, it is so anti-travel agent that, on its website, agents are directed only to “Alaska Airlines Vacations,” which is a division of Mark Travel, in Milwaukee. There is no other mention of travel agents on that entire site. Today, Alaska brags that almost half of

its sales are online (Travel Weekly, October 24, 2002, available at [www.twcrossroads.com](http://www.twcrossroads.com) by searching under “Alaska Airlines”), and that to exceed 50% would be “an important benchmark for us.” Since Alaska has already succeeded in doing half of its business outside the CRSs, its 1997 comments are clearly outdated.

Orbitz has bragged that its direct link with American is less costly than going through the CRS. It states that, for a reservation, it now charges American a flat \$6.67 “transaction fee” (i.e., “commission”) and a flat \$4.00 booking fee. Travel Weekly, August 29, 2002, available online at [www.twcrossroads.com](http://www.twcrossroads.com) by searching under “Orbitz”). This \$10.67 total is allegedly less than the \$3.89 per booking that American would have to pay Worldspan because the “industry average is three segments per booking,” which would bring Worldspan’s fee to \$11.67 per booking.

However, this \$1.00 savings is completely bogus, for five reasons:

First, it ignores the undisclosed millions of dollars that American has given Orbitz to subsidize the development of the direct link.

Second, it ignores the millions of dollars that American paid toward Orbitz’s startup costs.

Third, it ignores the millions of dollars that American has paid to meet Orbitz’s accumulated deficits of \$158 million at the end of 2001. (Form S-1 of Orbitz on file with the Securities and Exchange Commission.)

Fourth, Orbitz neglected to mention that it rebates about one third of its Worldspan incentives to the founding airlines, including American. (Id.)

Fifth, Orbitz fudges the fact that, while the “industry average” may be three CRS segments per booking,” the average includes bookings that include hotels, car-rentals, cruises, and tours, as part of the PNR, and it also includes multiple-segment trips of the type that Orbitz does not typically offer. The true comparison is Worldspan’s fee for just two segments, minus a one-third rebate, or \$5.21, versus the total commission and fee of \$10.67 plus a prorated portion of the development cost of the line, Orbitz’s startup costs, and Orbitz deficits.

In reality, Worldspan is already cheaper for American than the direct link, possibly by 50% or more.

The truth is that there is no distribution method that is cheaper for airlines than the CRS, except for booking on the airline’s website. As shown above, travel agencies are getting access to those E-Fares to a limited extent now, and they will be getting more access in the future through the CRS.

## **5. The Myth Of Supra-Competitive Booking Fees**

DOT states that:

“The systems fund the bonuses paid subscribers with the profits they obtain from supra-competitive booking fees.” 67 FR 69408.

DOT thus believes that the booking fees charged by the vendors, such as the \$3.89 per segment paid by American and cited by Orbitz above, are a kind of monopoly profit. DOT's economic conclusion is not supported by any economic evidence and therefore lacks a rational basis.

The lynchpin is the argument that the quotas in the productivity pricing system hold agencies captive so that they cannot or do not, or will not, book outside the CRS. However, as shown above, every agency has an ample margin or cushion for booking outside the CRS under offers being made now. Therefore, the systems do not hold agencies captive. Therefore, there cannot be any monopoly profits because the systems have no monopoly power. The lynchpin falls away, and the economic argument must collapse.

The economic truth is that the airlines participate in all of the CRSs because it is by far the cheapest way of reaching all travel agencies, which prefer a universal booking system over individual airline websites.

The contrary argument has been made by the "have not" airlines for a generation, yet the only evidence that they can muster is that vendors "set the quota high enough that the agency as a practical matter cannot afford to make substantial use of another system or database." 67 FR 69408. Since, as shown, the complainers' assertions are no longer true, there is no need for regulatory intervention.

## 6. The Myth Of Incentive-Driven Advice

DOT states that:

“Providing financial incentives to travel agencies to use one system for all or most of its bookings would appear to frustrate our goal of giving travel agencies more leeway to use multiple systems and databases, including the Internet.” (cite)

The biggest myth of all in this proceeding is the myth that travel agencies can be incentivized to book fares that are not in the client’s best interest. The Department has rightly rejected such a strawman in the past, in the case of overrides. When the Department’s Inspector General worried that market-share overrides might or could theoretically “induce travel agencies to recommend airline services that will increase their commission payments rather than the services that best meet the needs of their customers.” (Report on Travel Agent Commission Overrides, referred to at 67 FR 69371), the Department declined to adopt rules or policies. The reason why DOT did not act is that the IG “found no proof that override commissions had caused travel agencies to offer misleading or incomplete advice.” 67 FR 69398 (emphasis supplied).

The situation is identical here. There is no proof that CRS incentives cause travel agencies not to find and offer the lowest fares that are consistent with corporate travel policy, even if such fares are available only on the Internet or at an airline’s website.

In reality, the opposite is true for LAC's members. Corporate clients call the shots, and not vice-versa. If the corporate client obtains a discount fare that is only available on Delta.com, then LAC's members can and will book there. The Department knows this, after all. Elsewhere in the NPRM, in the context of displays of fares, DOT states:

“The travel agency business is intensely competitive. Travel agencies that provide poor or misleading advice to their travelers will lose customers. The competitive pressures on travel agencies should offset incentives to give customers misleading advice.” 67 FR 69398.

The Department has fully addressed its own concerns in another portion of the same document.



## **E. THREE OTHER MYTHS BEHIND INDUSTRY OPPOSITION TO PRODUCTIVITY PRICING**

### **1. The Myth Of Universal Penalty Pricing**

Several commenters in 1997 got mixed up between two distinct concepts: damages for early termination based on lost booking fees (penalty damages) and the penalty that an agency must pay under some contracts for not achieving the quota (penalty pricing). DOT echoes the confusion:

“The damages claimed by the systems are commonly so large that they deter travel agencies from terminating a contract before the end of its term.... A 1996 survey by [ASTA] indicates that ... 86 percent of all contracts used productivity pricing.” 67 FR 69405

Each of the above-quoted sentences deals with a different concept. Let us uncomplicate the concepts: when a travel agency breaches its contract by early termination, all vendors will claim lost booking fees as their actual damages, regardless of whether they are stated as liquidated damages in the contract (although in practice some vendors eventually settle for less). DOT has proposed to outlaw such claims, which is an excellent idea, as noted in Part H below.

On the other hand, penalty pricing can be more benign. Under most existing Worldspan and Amadeus contracts (but not Amadeus' offers in 2003, which have no penalty pricing), as noted above, the penalty is not lost booking fees but simply a percentage of the fixed monthly charges. Further, under Sabre and Galileo offers

being made today, the penalty is not lost booking fees, either, but \$2.40 per lost booking, which is about one-third lower than the booking fee charged to airlines.

However, since penalty pricing is part of productivity pricing, and since DOT has proposed to outlaw the latter, it will be outlawing the former, a fortiori. However, neither the Department nor any airline has ever criticized the percentage-of-monthly charges penalty pricing that Worldspan and Amadeus use under their existing contracts and have used for over a decade. Why, then, is regulatory intervention justified? It cannot be justified when the record shows that DOT was apparently not even aware of the productivity pricing formulas used by half the vendors.

## **2. The Myth Of Fraudulent Bookings**

In the past, Delta, Alaska, and America West have complained that productivity pricing should be outlawed because it encourages agencies to make fraudulent bookings in order to meet their quotas, and the vendors charge the airlines a fee for each such booking. DOT apparently believes in this myth, although it does not appear to be basing its decision on it. DOT says:

“[T]he systems’ productivity pricing fee structures encouraged a small number of travel agencies to abuse the passive booking function in order to meet the minimum monthly quotas established by their CRS contracts. Since the systems have chosen to base their subscriber contracts on a pricing structure that encourages fraudulent

transactions, they should bear any cost created by travel agent abuse of that function.” 67 FR 69401 (emphasis supplied).

DOT’s assertion is not supported by fact. As far as we know, there have been no reports of fraudulent bookings in many years, and since the systems no longer give credit for passive bookings, fraud is less likely to occur. Therefore, it is wrong for an agency of the United States Government to make these statements in an NPRM issued in 2002 as though they were facts in this record.

### **3. The Myth Of Windfalls At The Airlines’ Expense**

Most of the major U.S. airlines appear to believe that booking fees are high because the CRSs need to share such a large portion thereof with travel agencies. There is an undertone in all airline comments that agencies are causing the airlines to be charged excessively.

Here, we can say that we are pleased to see that DOT does not appear to agree with such a myth. DOT’s theory is that booking fees are high – not because of productivity incentives – but rather because the systems are in a position to charge “monopoly rents” 67 FR 69392 and “supra-competitive booking fees” 67 FR 69407.

Here is where the airlines’ argument must fail. If the systems stopped paying incentives to travel agencies, would the systems pass their savings on to the airlines? Of course not; they are capable of keeping their monopoly rents, so they would do so. It is extremely naïve of the airlines to think otherwise.

**F. OUTLAWING PRODUCTIVITY PRICING WOULD HURT  
THE MOST EFFICIENT DISTRIBUTORS**

DOT understands that travel agencies perform a useful service. It says:

“We recognize that travel agents provide the public with valuable information and strengthen the ability of airlines to compete.” 67 FR 69406.

DOT also understands that its proposal would hurt LAC’s members, who are the most highly productive, and hence efficient, of all travel agencies. As DOT admits:

“Ending productivity pricing would, however, reduce the revenue of many travel agencies, especially the larger travel agencies....” 67 FR 69,423

“Reduce the revenue” is an understatement. For many if not most of LAC’s members, the system’s incentives mean the difference between a profit and a loss. Further, there is no way that the loss could be compensated for, as most corporate clients will not absorb it through increased service fees. As a result, at least some of LAC’s members will go out of business, as will many other highly productive travel agencies throughout the nation.

Admittedly, some of LAC’s members will be able to compensate for the revenue loss. However, is this what DOT wants to achieve? Absolutely not; in

fact DOT predicts that, “since the travel agency industry is so competitive, most of the benefit of improved CRS pricing and services would be passed on to agency customers.” 67 FR 69,424. In truth the exact opposite must happen: the loss of incentives will be passed on to agency customers in the form of higher fees.

Furthermore, the loss of incentive revenue would only be half of the harm. The other half would be the non-reimbursed expense of purchasing or leasing computer systems from third-party vendors, which is an expense that would drive many travel agencies out of business, especially when coupled with the lost revenue.

In another context in the NPRM (discussion of the Department of Justice’s unjust ideal of abolishing all airline booking fees and charging travel agencies for the entire cost of the CRS), DOT declined to adopt a proposal because:

“Such a rule, however, could be disruptive, since the systems now obtain the great majority of their revenues from airlines and not from travel agencies.” 67 FR 69399.

The same considerations should apply in the case of outlawing productivity pricing, as it would be disruptive in the extreme, as shown here. The disruption would hurt most in the most efficient sector of the business: corporate travel.

In a nutshell, abolition of productivity pricing will have the following effects:

- Many travel agencies will go out of business, especially the most efficient ones. Many others will have to lay off employees.
- Consumers will have to pay higher fees to the agencies that are left.
- The CRSs will be unable to attract new subscribers through financial incentives, whereas the systems' competitors, Orbitz and supplier websites, will remain free to do so.

Never has so much destruction been proposed for so little benefit.

## **G. THE BENEFITS OF OTHER DOT PROPOSALS**

LAC favors all of the rest of DOT's proposals that affect travel agencies, including but not limited to:

1. Three-year maximum contracts, as the experiences of our affiliated Canadian and EU travel agencies is that they have more flexibility than U.S. agencies to chose the best system as technology evolves and more opportunity for negotiation.

2. Prohibition of disseminating of marketing data, as the data allow the major U.S. airlines to pressure LAC's members to make each and every airline a "preferred" airline, on pain of retaliation, and because the data fuel the zero-sum game called "market-share overrides."

3. Prohibition of tying access to corporate fares to use of any particular system. While there will be no more ownership or marketing affiliations in the future, DOT should adopt this proposal to ensure that such tying does not come back into fashion.

4. Prohibition on penalty damages geared to lost booking fees, in the event that the agency terminates its CRS contract.

5. Prohibition on penalty pricing for not meeting the quota, if the penalty is geared to lost booking fees. LAC had advocated such a rule in 1997, explaining that lost-booking-fee pricing was a de facto minimum-use clause, since

quotas were then so high that agencies could usually afford to park a system. Unfortunately, in this NPRM, DOT has repeatedly used our position in 1997 as support for abolishing productivity pricing as a whole, ignoring the present reality of low quotas, which we discussed in Part C. above. So, let us be clear: quotas, incentives, and penalties are fine and should not be prohibited, as long as the penalty is geared to the cost of the leased system rather than the lost booking fee.



## **H. TWO OTHER ACCEPTABLE OUTCOMES**

### **1. Repeal**

LAC would welcome repeal or simple non-extension of all of the CRS rules, as the harm that would be caused by outlawing productivity pricing far outweighs the benefits of either the existing rules or the new proposals that we support in G. above. Furthermore, in light of the coming absence of marketing relationships that we discuss in Part C.2. above, we believe that the Department needs to revisit the issue of its authority to regulate contracts between CRSs and travel agencies.

### **2. Universal Participation**

LAC would respectfully point out that, for consumers, the biggest problem in travel distribution is that not all airfares are available in all systems or other channels of distribution. The Department knows this well, but it has declined to do anything about it, on the grounds that it may not have the authority to do so. However, putting a fare on Orbitz but not in a CRS is so clearly unfair to consumers without Internet access that it ought to be outlawed immediately.

The current “mandatory participation” rule is almost meaningless, as it applies only to system-owning airlines, and it affects only the four CRSs. It is deficient because there will soon be no system-owning airlines, and it does not even address the Orbitz situation described above.

Accordingly, LAC asks the Department to adopt a “universal participation rule” requiring that every airline publish every public airfare in all channels of distribution. Such a rule is so important that, for LAC’s members, an excellent outcome to this proceeding would be repeal of all present CRS rules and adoption of the universal-participation rule.

Wherefore, for the foregoing reasons, LAC respectfully asks the Department: (1) not to outlaw productivity pricing; (2) to adopt the other proposals affecting travel agencies; and (3) to adopt a rule requiring that all fares be published in all channels of distribution. As an alternative to (1) and (2), LAC would ask that the Department repeal the existing CRS rules entirely.

Respectfully,

*/s/ Mark Pestronk*

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## **CERTIFICATE OF SERVICE**

I, Mark Pestronk, hereby certify that I have on March 17, 2003, sent a copy of these comments to the parties named below, by first-class mail:

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